

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

JOHN CARR POWERS,

Plaintiff,

V.

THE CITY OF SEATTLE, *et al.*,

Defendants.

Case No. C06-1727RSL

ORDER DENYING DEFENDANT
JENNIFER MCLEAN'S MOTION
FOR SUMMARY JUDGMENT

I. INTRODUCTION

This matter comes before the Court on a motion to dismiss filed by defendant Seattle Police Detective Jennifer McLean (Dkt. #39). McLean argues that during the relevant time, she was working on an assignment with the Seattle Federal Bureau of Investigation (“FBI”) as a specially deputized Federal Task Force Officer on the Public Integrity Task Force (“PITF” or the “task force”). McLean argues that as a specially deputized FBI agent, she cannot be sued for the tort of defamation, nor is she a “state actor” for purposes of liability under 42 U.S.C. § 1983.

For the reasons set forth below, the Court denies McLean's motion.

II. DISCUSSION

McLean was assigned to the PITF in January 2003. The task force was established by a Memorandum of Understanding (“MOU”) between the Seattle Police Department (“SPD”) and

1 the Seattle FBI. The mission of the PITF was to identify and target for prosecution individuals
 2 committing acts of public corruption. The task force conducted an investigation into the
 3 suspected criminal activity of several SPD officers, including plaintiff. The MOU provides,
 4 “Liability for any negligent or willful acts of task force employees, undertaken outside the terms
 5 of this MOU will be the sole responsibility of the respective employee and agency involved.”
 6 MOU (Dkt. #39-2).

7 The FBI officially closed its investigation of Powers on March 29, 2005. Around July
 8 2005, McLean was assigned to the Criminal Intelligence Section of the SPD as a Detective,
 9 which is her current assignment with the SPD. Plaintiff argues that after the FBI closed its
 10 investigation, McLean made numerous defamatory statements about him to various sources,
 11 including the press, witnesses,¹ and in summary documents provided to the SPD. For example,
 12 Powers alleges that McLean wrote summary documents for the SPD that included statements
 13 that Powers used illegal drugs both on and off duty, participated in a residential burglary,
 14 engaged in improper conduct with exotic dancers, and associated with criminals. Declaration of
 15 John Powers, (Dkt. #46) (“Powers Decl.”), Ex. 3. In addition, Powers alleges that McLean
 16 made defamatory statements, including that he used cocaine and had sex in his patrol car, to
 17 Seattle Times reporters Steve Miletich, Mike Carter, and Christine Willmsen. Id.

18 McLean filed her motion as a 12(b)(6) motion for failure to state a claim upon which
 19 relief can be granted. However, both parties filed, and the Court has considered, documents
 20 beyond the pleadings. Therefore, the Court considers this as a motion for summary judgment.
 21 On a motion for summary judgment, the Court must “view the evidence in the light most
 22 favorable to the nonmoving party and determine whether there are any genuine issues of material
 23 fact.” Holley v. Crank, 386 F.3d 1248, 1255 (9th Cir. 2004). All reasonable inferences

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 25 ¹ Powers alleges that McLean told witness Robert Chandler that Powers engaged in
 26 criminal activity and “Powers shaves his body to avoid leaving DNA at the scenes where he
 27 commits crimes.” Powers Decl., Ex. 3.

1 supported by the evidence are to be drawn in favor of the nonmoving party. See Villiarimo v.
 2 Aloha Island Air, Inc., 281 F.3d 1054, 1061 (9th Cir. 2002). “[I]f a rational trier of fact might

3 resolve the issues in favor of the nonmoving party, summary judgment must be denied.” T.W.
 4 Elec. Serv., Inc. v. Pacific Elec. Contractors Ass’n, 809 F.2d 626, 631 (9th Cir. 1987).

5 Brian Kipnis, Assistant United States Attorney and Chief, Civil Division, Office of the
 6 United States Attorney for the Western District of Washington, has filed a certification pursuant
 7 to 28 U.S.C. § 2679(d)(1) and the authority delegated to him pursuant to 28 C.F.R. § 15.3(a),
 8 stating that “on the basis of the Amended Complaint in this matter and the information now
 9 available to me, [I] hereby certify that defendant Jennifer McLean, was ‘an employee of the
 10 government’ within the meaning of 28 U.S.C. § 2671 and 28 U.S.C. § 2679(d)(1), and was
 11 acting within the scope of her office or employment at all times and in all respects relevant to
 12 the allegations in the Complaint.” (Dkt. #35).

13 In addition to the certification, McLean has stated in a declaration that until April 2007,
 14 she was authorized to act on behalf of a federal agency as reflected by her Special Deputation
 15 Appointment forms. The appointment forms and certification are sufficient to show that she was
 16 a temporary federal employee during the relevant time.² However, the Court must also consider
 17 whether the challenged actions were performed in the scope of her federal employment.

18 The certification is “prima facie evidence that a federal employee was acting in the scope
 19 of her employment at the time of the incident and is conclusive unless challenged.” Billings v.
 20 United States, 57 F.3d 797, 800 (9th Cir. 1995). If the certification is unchallenged or
 21 unsuccessfully challenged, federal law requires substitution of the United States as a defendant

23 2 The FTCA defines “employee of the government” to include “persons acting on behalf
 24 of a federal agency in an official capacity, temporarily or permanently in the service of the
 25 United States, whether with or without compensation.” 28 U.S.C. § 2671. In this case, there is
 26 a short lapse between the dates in McLean’s appointment forms. However, during that time, it
 27 appears that she was at least a *de facto* federal officer. See, e.g., Turley v. United States, 503 F.
 28 Supp. 2d 912, 915-16 (N.D. Ohio 2007) (numerous internal citations omitted).

1 for a tort claim under the Federal Tort Claims Act (“FTCA”), 28 U.S.C. §§ 1346, 2671 *et seq.*
 2 28 U.S.C. § 2679(d)(4). Plaintiff challenges the certification. The certification is subject to *de*
 3 *novo* review. Green v. Hall, 8 F.3d 695, 698 (9th Cir. 1993). Plaintiff “bears the burden of
 4 presenting evidence and disproving the Attorney General’s certification by a preponderance of
 5 the evidence.”³ Billings, 57 F.3d at 800. Also, in general, “the issue of scope of employment is
 6 a question of fact, but becomes a question of law when the facts are undisputed and no
 7 conflicting inferences are possible.” Id. at 801 (internal citation omitted).

8 To determine whether a defendant’s alleged misconduct was within the scope of his or
 9 her employment, district courts look to state law on respondeat superior. Billings, 57 F.3d at
 10 800. Under Washington law, an employee’s conduct is outside the scope of his or her
 11 employment if “it is different in kind from that authorized, far beyond the authorized time or
 12 space limits, or too little actuated by a purpose to serve the master.” Robel v. Roundup Corp.,
 13 148 Wn.2d 35, 53 (2002) (citing Restatement (Second) of Agency §§ 228(1) & (2) (1958)).
 14 “The proper inquiry is whether the employee was fulfilling his or her job functions at the time he
 15 or she engaged in the injurious conduct.” Id. at 53-54. Courts should consider “whether the
 16 employee was, at the time, engaged in the performance of the duties required of him by his
 17 contract of employment, or by specific direction of his employer; or, as sometimes stated,
 18 whether he was engaged at the time in the furtherance of his employer’s interest.” Lunz v. Dept.
 19 of Labor & Indus., 50 Wn.2d 273, 278 (1957).

20 McLean and the Attorney General’s designee state that McLean was acting during the
 21 scope of her federal employment during all relevant times and with respect to all allegations in
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23 ³ For example, the court in Billings affirmed the finding that plaintiff had not met her
 24 burden by merely speculating that the individual defendant was acting outside the scope of her
 25 federal employment. Billings, 57 F.3d at 800-801; see also Clamor v. United States, 240 F.3d
 26 1215 (9th Cir. 2001) (finding that a civilian employee of the Navy was not acting within the
 27 scope of his employment when he was involved in an off-duty traffic accident in a rental car
 28 paid for by the Navy).

1 the complaint. Declaration of Jennifer McLean (Dkt. #41) (“McLean Decl.”) at ¶ 5;
 2 Certification at p. 2.⁴ However, their assertions are conclusory. For that reason, the Court
 3 ordered the parties to provide additional briefing regarding what the FBI authorized McLean to
 4 do after the investigation ended and whether the allegedly defamatory statements were made in
 5 the course of her FBI employment.

6 In response, McLean’s FBI supervisor, Mark Ferbrache, has provided a declaration
 7 stating that after the investigation was closed, Detective McLean acted in a liaison role between
 8 the PITF and the SPD. Declaration of Mark Ferbrache, (Dkt. #82) (“Ferbrache Decl.”) at ¶ 10.
 9 That role “included preparing summaries of investigations and providing appropriate reports of
 10 investigation to the management of the SPD, including the Chief of Police.” *Id.* at ¶¶ 10, 14.
 11 Powers argues that McLean defamed him in reports she drafted for the SPD, including OPA
 12 summaries and a summary titled “Confidential Work Product for the Chief of Police” which
 13 described Powers’ alleged misconduct. However, Ferbrache’s declaration and his deposition
 14 testimony show that McLean’s drafting of the reports and summaries was within the scope of
 15 her federal employment. *Id.*; Ferbrache Dep. at p. 61. This is true even though Ferbrache was
 16 not aware of the *specific* summaries about which Powers complains. Because McLean was
 17 acting within the scope of her federal employment when she drafted those documents, she is not
 18 the proper defendant for claims based on their contents.

19 Similarly, Ferbrache stated in both his declaration and his deposition that McLean’s
 20 statements to witnesses were made in the scope of her federal employment.⁵ Febrache Decl. at
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22 ⁴ The Court has not considered the bulk of the Declaration of John Powers. Most of the
 23 declaration consists of argument, which is not appropriate in a declaration, rather than a
 24 recitation of facts. The Court has considered the documents attached to the declaration.

25 ⁵ In discovery responses, Powers alleged that McLean told an officer’s attorney that
 26 Powers was a “heavy for organized crime.” Powers Decl., Ex. 3. He also alleged that McLean
 27 told Sergeant Strand “and possibly others” that “Powers made death threats against McLean and
 28 deputy prosecuting attorney Hank Corscadden.” The certification and McLean’s declaration

¶¶ 9, 14; Ferbrache Dep. at p 61. Powers has not provided any evidence to counter those statements. Accordingly, McLean is not a proper defendant for claims based on the statements to witnesses.

However, at present plaintiff has raised a serious question as to whether McLean's post-investigation contacts with the press were required by the FBI, made at its specific direction, or in furtherance of the FBI's interest. There is no evidence as to why McLean made the press contacts at issue, if she indeed did so.⁶ McLean's declaration in support of the motion contains only a legal conclusion, rather than facts or an explanation. Ferbrache's declaration states that "McLean's contacts with the press were part of her efforts to protect sources and to protect the integrity of her investigation." Ferbrache Decl. at ¶ 12. He also states that "McLean's discussions with local press reporters, in an attempt to protect confidential sources and informants, was done within her duties as a member of the PITF." Id. at ¶ 14. However, during his deposition, when asked about his declaration, Ferbrache clarified that his statements about McLean's contacts with the press applied only to her contacts "during the time of the active investigation." Ferbrache Dep. at pp. 38-39; id. at pp. 34-35. He has not stated that the post-investigation contacts were within the scope of her federal employment or that they furthered the FBI's purposes. Instead, Ferbrache said that he discouraged McLean from talking to the press. Id. at pp. 12, 60. The FBI "generally do[es] not talk to the press." Id. at p. 10. He also testified that after the investigation was over, McLean had no duty to continue the investigation for the FBI. Instead, her role was to tie up "loose ends . . . with respect to evidence, paperwork, and specifically reviewing of the file for documents that were relevant to Powers' employment with the [SPD] to be identified and reviewed and ultimately forwarded to the [SPD] for use in

contend that those statements were made in the context of McLean's federal employment, and Powers has not argued or provided any evidence to counter those assertions.

⁶ Under the circumstances, the Court must assume for purposes of this motion that the post-investigation contacts with the press were made.

1 whatever administrative inquiry they may or may not decide to pursue.” Id. at pp. 31-32.
 2 Finally, pursuant to the MOU, “No information pertaining to PITF itself will be released to the
 3 media without mutual approval of all participants.” Ferbrache was not aware of any agreement
 4 to release information to the media about plaintiff. Id. at p. 23. These facts all suggest that
 5 McLean might have been acting outside the scope of her federal employment when she allegedly
 6 spoke with the press after the conclusion of the investigation.⁷ These facts also distinguish this
 7 case from Ward v. Gordon, 999 F.2d 1399, 1403 (9th Cir. 1993), in which the Ninth Circuit
 8 considered whether an Army officer and physician was acting within the scope of his federal
 9 employment when he allegedly committed medical malpractice during his residency program at
 10 Children’s Hospital. The court concluded that when Gordon performed the medical services
 11 that allegedly led to the injury, he was acting as an employee of both the hospital and the Army:
 12 “Gordon acted precisely and only as the government expected and required him to act. . . . The
 13 interests of Gordon’s other “master,” the United States Government, were not compromised, but
 14 rather furthered – and furthered in a foreseeable and foreseen manner – by Gordon’s service to
 15 the hospital.” Ward, 999 F.2d at 1404.⁸ In this case, there is at this time insufficient evidence

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 17 ⁷ In addition, McLean was no longer acting as the FBI’s “borrowed servant” under
 18 Washington law when she made the post-investigation press contacts because the FBI was not
 19 controlling, directing, or supervising those contacts. See, e.g., Brown v. Labor Ready NW, Inc.,
 20 113 Wn. App. 643, 649 (2002) (explaining that pursuant to the borrowed servant doctrine, “the
 21 sole question for vicarious liability . . . is whether the master accepted and controlled the service
 22 that led to the injury”).

23 ⁸ See also Council on Am. Islamic Relations v. Ballenger, 444 F.3d 659, 662 (D.C. Cir.
 24 2006) (per curiam) (holding that a congressman’s allegedly defamatory statements to the press
 25 were within the scope of his federal employment because the “appropriate question, then, is
 26 whether that telephone conversation – not the allegedly defamatory sentence – was the kind of
 27 conduct Ballenger was employed to perform”). Similarly, in Turley, a sheriff assigned to a DEA
 28 task force allegedly made defamatory statements to judicial officers in the course of applying for
 a search warrant and during a state bond hearing. The court found that he was acting in the
 scope of his federal employment because “[g]etting a search warrant and testifying at a bond
 hearing are acts routinely performed by federal law enforcement officers.” 503 F. Supp. 2d at

1 that McLean's post-investigation contacts with the press furthered the FBI's interests.

2 As a final matter, neither party has requested an evidentiary hearing. Nor does one
3 appear necessary at this point. Accordingly, the Court has considered the matter based on the
4 documentary evidence. See, e.g., Green, 8 F.3d at 698 (9th Cir. 1993). However, after
5 discovery has progressed, McLean may move again for summary judgment or may assert this
6 defense at trial if appropriate.

7 **III. CONCLUSION**

8 For the foregoing reasons, the Court DENIES McLean's motion to dismiss (Dkt. #39).

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10 DATED this 11th day of February, 2008.

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14 Robert S. Lasnik
15 United States District Judge
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24 916. If it turns out that McLean was authorized to speak with the media as part of her
25 continuing efforts to protect her sources even after the investigation was terminated, then even
26 untrue and defamatory statements might still be considered related to her federal employment.
27 At this point, for 12(b)(6) and summary judgment purposes, the evidence suggests McLean was
28 not authorized by the FBI to speak to the media at all after the investigation was over.

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